No. 80-853

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PENTHOUSE INTERNATIONAL, LTD., a corporation; ROBERT GUCCIONE; LOWELL BERGMAN and JEFF GERTH,

Appellants,

—v.—

RANCHO LA COSTA, INC., a Nevada corporation; LA COSTA LAND COMPANY, an Illinois corporation; LA COSTA MANAGEMENT COMPANY, a California corporation; LA COSTA COMMUNITY ANTENNA SYSTEM, INC., a California corporation; PARADISE HOMES, INC., a California corporation; MERV ADELSON and IRWIN MOLASKY,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

This is a proposed appeal by the defendants in a libel suit from a California decision which denied their motion for partial summary judgment. The case has been pending in California for five and one-half years and is now scheduled for trial in approximately seven weeks (February 10, 1981). The decision appealed from refused to hold the appellees "public figures" as a matter of law prior to trial and held that the libel article was not a qualifiedly privileged communication under a local California statute. This Court previously denied a petition for certiorari by these same appellants from the denial of a substantially identical motion for summary judgment in 1976.[1] The issues presented by this attempted appeal are not new issues but are substantially the same as the issues which the appellants previously attempted to bring before this Court in their prior petition for a writ of certiorari, which was denied. Those issues are:

1. Whether the case is ripe for Supreme Court review when there has been no final judgment but only a determination (the fourth such determination below) that there are triable issues of fact.

2. Whether California's denial of appellants' repetitive motion for summary judgment on the "public figure" issue raises any substantial federal question.

3. Whether the determination that the libel was not qualifiedly privileged under a local California statute has "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States".

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1 *Penthouse International, Ltd., et al.* v. *Rancho La Costa Inc., et al.*, Dkt. No. 76-1355, *cert. denied*, 431 U.S. 930 (1977).

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
A. The Appellees	2
B. The Appellants	3
1. Penthouse and Guccione	3
2. Gerth and Bergman	4
C. The Proceedings Below	4
MOTION TO DISMISS	7
A. There Has Been No Final Judgment Or Decree By The Highest Court Of California With Respect To The Questions Sought To Be Raised On This Appeal, Nor Has There Been An Effective Determination Of The Litigation	8
B. There Was No Question Involved In Any Of The Prior Proceedings Concerning The Validity Of Any State Statute Or Constitutional Provision As Repugnant To The Federal Constitution Or Any Provision Of Federal Law. Appellants' Attempt To Raise Such An Issue For The First Time Before This Court Is Both Disingenuous And Untimely.	9
C. This Appeal Fails To Present A Substantial Federal Question	12
MOTION TO AFFIRM	13
A. Appellants Clearly Are Not Public Figures. At The Very Least, The Court Below Committed No Error In Refusing To Hold Them Public Figures As A Matter of Law	13

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PAGE

B. The Court Of Appeal Correctly Held That The *Penthouse* Article Was Not A Privileged Communication Under Section 47(3) Of The California Civil Code. Its Application Of Long-Settled California Law Raises No Federal Question 21

CONCLUSION 24

APPENDIX

TABLE OF AUTHORITIES CITED

PAGE

CASES

Associated Press v. *Walker*, 388 U.S. 130 (1967) 13

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) . 9

Curtis Publishing Co. v. *Butts*, 388 U.S. 130 (1967).... 13

Earl v. *Times-Mirror Co.*, 185 Cal. 165, 196 P. 57 (1921) 23

Edwards v. *San Jose Printing & Publishing Society*, 99 Cal. 431, 34 P. 128 (1893)..... 23

Equitable Life Assurance Society v. *Brown*, 187 U.S. 308 (1902) 12

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) ..13, 14, 15, 18, 20, 22

Gilman v. *McClatchy*, 111 Cal. 606, 44 P. 241 (1896) ...10, 22

Hiawassee River Power Co. v. *Carolina-Tennessee Power Co.*, 252 U.S. 341 (1920) 11

Hutchinson v. *Proxmire*, 443 U.S. 111 (1979) 16

Market Street Ry. v. *Railroad Commission*, 324 U.S. 548 (1945) 8

Mergenthaler Linotype Co. v. *Davis*, 251 U.S. 256 (1920) 11

Milheim v. *Moffat Tunnel Improvement District*, 262 U.S. 710 (1923)..... 12

Morris v. *National Federation of the Blind*, 192 Cal. App. 2d 162, 13 Cal. Rptr. 336 (1st Dist. 1961)..... 22

Newby v. *Times-Mirror Co.*, 46 Cal. App. 110, 188 P. 1008 (3d Dist. 1920)..... 23

Newby v. *Times-Mirror Co.*, 173 Cal. 387, 160 P. 233 (1916) 23

PAGE

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)...4, 13, 14

Penthouse International, Ltd. v. *Playboy Enterprises, Inc.*, 86 F.R.D. 396 (S.D.N.Y. 1980) (appeal pending) 4

Rosenbloom v. *Metromedia, Inc.*, 403 U.S. 29 (1971) .. 13

Time, Inc., v. *Firestone*, 424 U.S. 448 (1976) ...14, 15, 19, 20

Vegod Corp. v. *American Broadcasting Companies, Inc.*, 25 Cal. 3d 763, 160 Cal. Rptr. 97, 603 P.2d 14 (1979), *cert. denied*, 101 S.Ct. 242 (1980) 17

White River Lumber Co. v. *Arkansas ex rel. Applegate*, 279 U.S. 692 (1929) 10

Whitney v. *California*, 274 U.S. 357 (1927) 10

Wilson v. *Fitch*, 41 Cal. 363 (1871) 21

Wolston v. *Reader's Digest Ass'n*, 443 U.S. 157 (1979) . 6, 15-16, 19, 20

CONSTITUTIONAL PROVISIONS

United States Constitution, First Amendment 5, 10

Fourteenth Amendment.... 9, 10

California Constitution Art. 1, § 1..... 10

STATUTES

California Civil Code § 47(3) ..... *passim*

28 U.S.C. § 1257 ..... 8, 10

RULES

Supreme Court Rule 15.1(h) 12

PAGE

OTHER AUTHORITIES

Annot., "Relative Provinces of Court and Jury as to Privileged Occasion and Privileged Communication in The Law of Libel and Slander," 26 A.L.R. 830 (1923) 17

4 B. Witkin, Summary of California Law §§ 306-09 (8th ed. 1974) 22

R. Stern & E. Gressman, Supreme Court Practice (5th ed. 1978) 8, 11

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MOTION OF APPELLEES TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

This libel action is based upon a grievously defamatory article published in March 1975 by *Penthouse* magazine which falsely accused appellees of (among many other things) being "mobsters", "gangsters" and members of "organized crime" and the Rancho La Costa resort community in Southern

California of being a "syndicate" headquarters where "people could get killed . . . and you would never know". In the five and one-half years the case has been pending in the California Superior Court, the appellants have presented no proof of the charges, but, citing hearsay and claiming anonymous "sources", have repeatedly urged that the case be dismissed without trial. Their motions have been repeatedly denied.

A. The Appellees

The appellee corporations are the owners and operators of the resort and related facilities known as Rancho La Costa, located in Carlsbad, California.[2] The individual appellees, Merv Adelson and Irwin Molasky, are two of the principal stockholders.

Messrs. Adelson and Molasky are private real estate developers. They are also principals of Lorimar Productions, a highly respected television and motion picture production company. They are not well known and they have never engaged in politics or in public life nor have they ever sought to influence any public issue.

In the California courts appellants argued that appellees have influenced public issues secretly, by means of alleged criminal activities. The California Court of Appeal rejected that argument on the ground that the materials submitted to sustain it, mainly clippings from prior articles, were pure hearsay. There was no proof whatsoever that appellees had ever influenced or attempted to influence any public issue.

Appellees submitted sworn statements attesting their innocence, were subjected to extensive depositions and other discovery, answered thousands of questions, produced immense quantities of documents and submitted supporting affidavits including one by the Sheriff of San Diego County (stating that

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2 Appellee Rancho La Costa, Inc. is the parent of the other corporate appellees. None of the corporate appellees has any partially-owned subsidiary.

in years of routine surveillance, there had been no evidence of crime at La Costa), and another by one of the country's foremost organized crime experts, who reviewed the article and the evidence and concluded that the accusations made against appellees were "reckless in the extreme".

Recent investigative articles have confirmed appellees' innocence. The *Los Angeles Times* on February 25, 1979 reported that La Costa "hosts a parade of visitors from among the nation's most respected businesses", and quoted not only the San Diego County Sheriff, but also the California Attorney General's office ("there isn't anything illegal about La Costa"), the Chief Assistant Deputy U.S. Attorney ("a legitimate community"), and the Carlsbad Police Chief ("I think it is a clean operation and was always intended to be"). United Press International published a separate article reporting similar findings.

B. The Appellants

The appellants are the publishers of *Penthouse* magazine, Robert Guccione ("Guccione") and Penthouse International, Ltd. ("Penthouse"), and the two authors of the libel article, Lowell Bergman and Jeff Gerth.

1. Penthouse and Guccione

The record below showed *Penthouse* to be a publication dedicated to salacious exploitation of sex, with virtually no record of serious journalism when the La Costa article was published. Its only prior "organized crime" article (on Lucky Luciano) was exposed in the *New York Times* as a hoax.

Guccione himself has been accused in the press of ties to organized crime. His London gambling casino license was revoked. He has been unable to reinstate it or to obtain a license for a gambling casino in Atlantic City. A casino he operated off the coast of Yugoslavia was closed. Investigative articles have pointed out apparent long-standing links between Guccione and "mob bosses" in Atlantic City, Philadelphia and elsewhere.

A suit brought by Penthouse against the publishers of *Playboy* was recently dismissed by the United States District Court for the Southern District of New York upon findings that Penthouse had repeated the same motions over and over and made a "total mockery" of discovery, accompanied by "subterfuge, misrepresentation and false testimony". The Judge ruled that Guccione, his associate Kathy Keeton, his accountant, and his attorney had all given false testimony in court. *Penthouse International, Ltd.* v. *Playboy Enterprises, Inc.*, 86 F.R.D. 396 (S.D.N.Y. 1980) (appeal pending).

2. Gerth and Bergman

The appellant authors had virtually no experience as journalists prior to the La Costa article. They had published one prior article apiece. Both of their prior articles had focused largely on charges of alleged links between former President Nixon and the "Mafia". They then collaborated on an article for *Penthouse* on the same Nixon-Mafia theme. This was the sum total of their record as published "journalists" when they were commissioned to do the La Costa Article, which was published in March, 1975, featured on the front cover under the title "La Costa: Syndicate in the Sun"—and distributed to millions of readers nationwide.[3]

C. The Proceedings Below

Appellees filed their libel action in May, 1975 to recover damages for defamation and to vindicate their names. Shortly thereafter, appellants moved in the California Superior Court, Los Angeles County, for a summary adjudication that all of the plaintiffs were "public figures" within the principle of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny and that the article was qualifiedly privileged under Section 47(3) of the California Civil Code, which creates a

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3 A *true* copy of the article is attached hereto. The reprinted text included in Appellants' Appendix omits the cover title, graphics and other material of the original, as submitted below.

qualified privilege under state law for certain communications between parties having a mutual interest in the same subject matter. The Superior Court (Thomas W. LeSage, J.) denied the motion with respect to the present appellees, holding that the record presented triable issues of fact. Appellants' petitioned the Court of Appeal and the Supreme Court of California from that ruling but the petitions were rejected. Appellants then presented a petition for certiorari to this Court. This Court denied the petition for certiorari on May 23, 1977.

In 1977 appellants made another motion before a second judge of the Superior Court (Vernon Foster, J.) for a determination that the libel article was qualifiedly privileged pursuant to Section 47(3) of the California Civil Code. That motion was also denied. Judge Foster held that Judge LeSage's ruling was controlling and the same motion would not be heard again in the absence of any new facts or law.

In 1978, defendants made a third motion before a third Judge of the Superior Court (Charles Phillips, J.) requesting a summary determination in advance of trial that appellees are "public figures". Judge Phillips stated at argument that he believed the motion to be purely repetitive and that Judge LeSage had already determined the public figure status of the plaintiffs to be an "issue of fact" for trial. Defendants thereupon withdrew their motion.

In 1979 appellants made a *fourth* motion before a fourth Judge of the Superior Court, (George Dell, J.) for a summary determination in advance of trial that plaintiffs are "public figures" and that the libel article was qualifiedly privileged pursuant to Section 47(3) of the California Civil Code. They cited a portion of the same record that had been before Judge LeSage and presented no new material. This time, however, Judge Dell, despite the prior rulings, granted appellants' motion for partial summary judgment. He ruled that "Plaintiff Rancho La Costa, Inc. is a public figure under the First Amendment" of the Constitution because it "has been a subject of legitimate public controversy" and that plaintiffs

Adelson and Molasky are "public figures" because of their "voluntary involvement" with La Costa. He further held that the La Costa article was qualifiedly privileged pursuant to Section 47(3) of California's Civil Code, because it "concerns matters of legitimate public interest."

Upon appellees' petition for review by writ of mandate, the California Court of Appeal held Judge Dell's summary judgment rulings erroneous and vacated them[4]. The Court held that the Superior Court had applied an improper standard in holding appellees "public figures" because of their alleged "involvement" in a "subject of legitimate public controversy." The Court questioned whether La Costa was a matter of public controversy at all (Appendix B 14) and cited, among other things, the express holding of this Court in *Wolston* v. *Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979) that:

> A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971), which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today. (Appendix B 13).

The Court of Appeal further held that the Superior Court's determination that the libel article was qualifiedly privileged pursuant to Section 47(3) of the California Civil Code was in conflict with long-settled California law. The Court cited numerous authoritative California decisions squarely holding that a news article published in a newspaper or magazine of

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4 The opinion of the Court of Appeal is reported at 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 and is set forth as Appendix B to the Jurisdictional Statement.

general circulation—local or national—is not a privileged communication within the meaning of the strictly limited Section 47(3) privilege.

Third, the Court questioned the procedural propriety of the Superior Court's grant of a motion for summary judgment after the same court had previously denied the same motion on the same facts.

The appellants applied to the Court of Appeal for reargument of its decision. The application was denied. They then petitioned the California Supreme Court for a hearing, which was also denied. Appellants then filed this appeal.

It is submitted that the appeal does not present a proper case for this Court's review. The decision below that appellees' "public figure" status presents triable issues was a re-affirmation of the 1976 decision by Judge LeSage, which this Court previously declined to review. The lower court's construction of Section 47(3) of the California Civil Code was purely a matter of state law, raising no federal question at all. The appeal should be dismissed and the case allowed, at long last, to proceed to trial.

MOTION TO DISMISS

Appellees move to dismiss the appeal on the grounds that (1) there has been no final judgment or decree rendered by the highest court of the State of California with respect to the questions sought to be raised on this appeal, nor has there been an effective determination of the litigation; (2) there was no question involved in any of the prior proceedings concerning the validity of any state statute or constitutional provision as repugnant to the federal Constitution or any provision of federal law; (3) the federal questions sought to be raised on this appeal were not timely raised below, and (4) this appeal fails to present a substantial federal question. Each of these grounds is independently sufficient to require dismissal of this appeal.

A. There Has Been No Final Judgment Or Decree By The Highest Court Of California With Respect To The Questions Sought To Be Raised On This Appeal, Nor Has There Been An Effective Determination Of The Litigation.

Under 28 U.S.C. § 1257, only "[f]inal judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed" by this Court. "The finality requirement presupposes, of course, that there is a 'judgment' ". R. Stern & E. Gressman, Supreme Court Practice 173 (5th ed. 1978). In the instant case, although denominated a "judgment" by appellants, the only purported predicate for appeal in this case is the *opinion* of a California intermediate appellate court, directing the denial of a partial summary adjudication and ordering the case to trial. Indeed, appellants' petition to the Supreme Court of California made it clear that they were petitioning for hearing following the "*decision*" or "*opinion*" of the Court.

The petition for a writ of mandate below was not an "original proceeding" but a procedure recognized in California for seeking interlocutory appellate review. The decision of the Court of Appeal granting the writ of mandate did not finally determine the action or even the "public figure" status of the appellees, but ruled only that the issue should be determined at the trial which is scheduled to commence on February 10, 1981.

To provide a proper basis for appellate review by this Court, a state court judgment must be final in two respects:

> It must be subject to no further review or correction in any other state tribunal; *it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.*

Market Street Ry. v. *Railroad Commission*, 324 U.S. 548, 551 (1945) (emphasis added). Plainly, this criterion is not met.

This case meets none of the standards required for those limited instances in which review may lie notwithstanding the fact that further proceedings are contemplated in the state courts. *See Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-85 (1975). Inasmuch as the "public figure" issue has been expressly reserved for trial, can still be determined one way or the other, and its determination may be such that the alleged federal issue might disappear, this is not a case (1) where the federal issue sought to be raised "is conclusive or the outcome of further proceedings preordained" (*Id.* at 479); or (2) where "the federal issue . . . will survive and require decision regardless of the outcome of further state court proceedings" (*Id.* at 480); or (3) where "the federal claim has been finally decided . . . but . . . later review of the federal issue cannot be had" (*Id.* at 481), or (4) "where reversal of the state court on the federal issue would be preclusive of any further litigation rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come" (*Id.* at 482-83).

B. There Was No Question Involved In Any Of The Prior Proceedings Concerning The Validity Of Any State Statute Or Constitutional Provision As Repugnant To The Federal Constitution Or Any Provision Of Federal Law. Appellants' Attempt To Raise Such An Issue For The First Time Before This Court Is Both Disingenuous And Untimely.

Appellants argue that the Court of Appeal purportedly "sustained the validity of a California statutory privilege against the claim that the statute, as construed by the Court of Appeal, is repugnant to the Equal Protection Clause of the Fourteenth Amendment." (Jurisdictional Statement, p. 2).

The Court of Appeal, however, did not "sustain the validity" of any state statute and was not asked to do so. It applied a well-settled interpretation of Section 47(3) of the California Civil Code which applies to local publications as well as national ones. The appellants never contended below that the

statute, as construed, was "repugnant to the Equal Protection Clause of the Fourteenth Amendment", nor could they have, because Section 47(3) was *not* construed to protect "only 'local' media publications, not national publications", as they contend. (Jurisdictional Statement, p. 2). The leading California case, *Gilman* v. *McClatchy*, 111 Cal. 606, 44 P. 241 (1896), involved a local Sacramento newspaper, the *Evening Bee*, and the rule laid down in that case and followed in subsequent California cases applies equally to local and national publications.

Appellants make the further disingenuous contention that jurisdiction exists because the Court of Appeal purportedly held that the "privacy" clause of the California Constitution (Cal. Const. art. 1, § 1) is " 'paramount' to appellants' First Amendment rights under the United States Constitution". (Jurisdictional Statement, p. 2). The Court below did not so hold. It cited the privacy rights of individuals as one of many factors, including a series of express holdings by the California Supreme Court and other California courts, leading it to conclude that the limited statutory privilege for communications between interested parties was not intended to protect newspapers and magazines from liability for widely published defamatory falsehoods about private persons.

The appellants' papers seeking review of the decision of the Court of Appeal in the Supreme Court of California did not mention the Fourteenth Amendment, did not argue that Section 47(3) had been construed in a manner repugnant to the Equal Protection Clause, and did not contend that the California Constitution's privacy clause, as construed, was void as a matter of federal law. Those contentions are all made for the first time here, and are therefore not only spurious but untimely. For the purpose of jurisdiction pursuant to 28 U.S.C. § 1257(2), the federal question may not be raised for the first time in the jurisdictional statement filed with this Court. *White River Lumber Co.* v. *Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929); *Whitney* v. *California*, 274 U.S. 357, 362-63 (1927);

Hiawassee River Power Co. v. *Carolina-Tennessee Power Co.*, 252 U.S. 341, 342-44 (1920).

At most, appellants argued below that their First Amendment rights would be diminished by the decision of the Court of Appeal. They did not attempt to argue that the California Constitution's privacy clause, as construed, is unconstitutional—as would be required to raise the issue for appeal here. As the leading commentary states:

> [I]t is necessary for appeal purposes that *the litigant make specific and plain in the state court his contention that the application of the statute to his particular circumstances would make the statute void under federal law.* If he chooses not to phrase his claim in that manner but argues instead that his federal rights prevent application of the state statute to him, an adverse decision amounts to a denial of his assertion of federal rights rather than a validation of the state statute, and review can be had in the Supreme Court only via certiorari under § 1257(3).

Stern & Gressman, Supreme Court Practice, *supra* at 163-64 (emphasis added). *See also Mergenthaler Linotype Co.* v. *Davis*, 251 U.S. 256, 259 (1920).

The appellants argued at length in the courts below that the Court of Appeal was wrong in its construction of state law. That argument was rejected by the California Supreme Court. It is well-settled that "in respect to the construction of state statutes, the state court's views are completely nonreviewable by the Supreme Court." Stern & Gressman, Supreme Court Practice, *supra* at 165.

C. This Appeal Fails To Present A Substantial Federal Question

Appellants seek to raise federal issues by purporting to find several "holdings" in the so-called "judgment" of the Court of Appeal which are not there at all. The Court of Appeal did not hold that the appellants' public figure evidence was insufficient "because appellants had failed to prove the *truth* of the alleged libel" as contended by appellants (Jurisdictional Statement, p. 7) (emphasis in original) but because they had failed to prove that appellees had thrust themselves into controversy. The Court did not hold that appellees may recover on a theory of strict liability, nor did it hold that they may recover upon a showing of common law malice if they are held to be public figures. (*Id.*) Those issues were never before the Court.

The issues which appellants purport to raise are, in point of fact, "manufactured" solely for the purpose of this appeal and clearly lacking in merit. It is, of course, well-settled that the "mere allegation of a Federal question" does not "suffice to give jurisdiction" and that " '[t]here must be a real substantive question on which the case may be made to turn' . . . 'and not merely a formal, Federal question' ". *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902). Where, as here, the questions purportedly raised "are so absolutely devoid of merit as to be frivolous", *id.* at 311, or "are found to be so wanting in substance as not to need further argument", *Milheim* v. *Moffat Tunnel Improvement District*, 262 U.S. 710, 717 (1923), the appeal should be dismissed. *See also* Supreme Court Rule 15.1(h).

MOTION TO AFFIRM

Alternatively, appellees move to affirm the decision of the Court of Appeal on the ground that the decision was clearly correct.

A. Appellants Clearly Are Not Public Figures. At The Very Least, The Court Below Committed No Error In Refusing To Hold Them Public Figures As A Matter Of Law.

Under the decisions of this Court, "public figures" are required to prove knowledge of falsity or "reckless disregard for truth" in order to recover damages for a libel. That harsh burden, first imposed on libeled "public officials" in *New York Times Co.* v. *Sullivan*, *supra*, was extended to libeled "public figures" in the companion cases of *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U.S. 130 (1967).

In *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), this Court affirmed a further extension of the *Times* privilege to a libel suit "by a private individual . . . for a defamatory falsehood in a newscast *relating to his involvement in an event of public or general concern*". *Id.* at 52 (emphasis added). That ruling, however, was later expressly *overruled* in *Gertz* v. *Robert Welch, Inc*, 418 U.S. 323 (1974), where this Court said:

> The need to avoid self-censorship by the news media is . . . not the only societal value at issue.
>
> * * * * *
>
> The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court, as a basic of our constitutional system.' *Rosenblatt v. Baer*, 383 U.S. 75, 92, (1966) (concurring opinion). 418 U.S. at 341

This Court in *Gertz* specifically rejected the standard enunciated in *Rosenbloom*, stating that

> The 'public or general interest' test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. *Id.* at 346.

The Court in *Gertz* concluded that the *Times* privilege should be confined to "libel actions brought *by public persons*" (*Id.* at 343) (emphasis added); and it defined that term to include (1) persons who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" and (2) those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" (*Id.* at 345).

The foregoing principles were confirmed in *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), where this Court held that a famous socialite, whose divorce proceeding had become a "cause celebre"—in large part due to her own acts in calling not one but a series of press conferences to publicize it—was *not* a public figure because

> Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it. *Id.* at 453.

Appellants argued before Judge LeSage in 1976, at the time of their first summary judgment motion, that appellees were "public figures" because they were "involved" in a "public controversy". This Court decided *Time, Inc.* v. *Firestone*, *supra*, while the motion was still *sub judice* before Judge LeSage, and there reemphasized that plaintiff Firestone was not only not a "public figure" because she had not "thrust herself" into any public controversy "in order to influence the resolution of the issues involved in it", but also stressed that

> [P]etitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.* . . . In *Gertz*, however, the Court repudiated this position . . . . *Id.* at 454.

In light of *Gertz* and *Firestone*, Judge LeSage denied the motion, reserved the "public figure" issue for trial, and this Court denied certiorari from that ruling. Subsequent decisions by this Court have confirmed even more clearly that appellees are *not* public figures, and certainly cannot be so held as a matter of law on the record adduced below.

Thus, in *Wolston* v. *Reader's Digest Ass'n*, *supra*, this Court held that the plaintiff, the nephew of convicted spies Myra and Jack Soble, who had been a subject of "a major investigation into the activities of Soviet intelligence agents in the United States" and had "failed to respond to a grand jury subpoena," (*id.* at 162) resulting in an order to show cause why he should not be punished for contempt, was not a "public figure." This Court recognized that Wolston had received heavy publicity at the time of the grand jury proceedings but held that despite that publicity and the obvious importance of the issue of Soviet espionage, he was not a public figure either at the time of the publicity (*id.* at 166 n.7), or at the time of the libelous publication, because he did not voluntarily "engage[] the attention of the public in an attempt to influence the resolution of the issues involved" (*id.* at 168). This Court said that

> It is difficult to determine with precision the 'public controversy' into which petitioner is alleged to have thrust himself. Certainly, there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States; all responsible United States citizens understandably were and are opposed to it. *Id.* at 166 n.8.

This Court stated further:

> Petitioner's failure to appear before the grand jury and citation for contempt no doubt were newsworthy, but the simple fact that these events attracted media attention also is not conclusive of the public-figure issue. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.
>
> * * * * *
>
> Nor do we think that petitioner engaged the attention of the public in an attempt to influence the resolution of the issues involved. Petitioner assumed no 'special prominence in the resolution of public questions.' See *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 351. . . . In short, we find no basis whatsoever for concluding that petitioner relinquished, to any degree, his interest in the protection of his own name. *Id.* at 167-68.

This Court also said:

> This reasoning leads us to reject the further contention of respondents that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction . . . To hold otherwise would create an 'open season' for all who sought to defame persons convicted of a crime. *Id.* at 168.

The same rationale was applied by this Court in *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979). This Court there held that a prominent scientist and administrator who had broad "access to the media", was also *not* a public figure, on the ground that:

> Hutchinson did not thrust himself or his views into public controversy to influence others. Respondents have not identified such a particular controversy; at most, they

> point to concern about general public expenditures . . . . *Id.* at 135.

The present appellees plainly do not fit the "public figure" definition thus enunciated, repeated and reaffirmed by this Court. They did not thrust themselves into any public controversy, nor did any of them attempt to "influence" the resolution of any issue. *See also Vegod Corp.* v. *American Broadcasting Companies, Inc.*, 25 Cal. 3d 763, 160 Cal. Rptr. 97, 603 P.2d 14 (1979), *cert. denied,* 101 S.Ct. 242 (1980) (plaintiffs engaged in widely advertised close-out sale of well-known department store held not to be public figures).

The only "proof" of public figure status presented below was a collection of clippings containing mention of one or more of the appellees. The Court of Appeal properly recognized that such a collection of clippings was not enough to establish public figure status under the decisions of this Court, which all contained records of publicity far more extensive than the appellants alleged against the present appellees.[5]

Thus, the record which this Court rejected as insufficient to show Elmer Gertz to be a "public figure" in *Gertz* v. *Welch* included the following testimony by Elmer Gertz himself:

> . . . I was asked to list all of my writings. That is a job impossible to fulfill because I have written for publication literally since I have been in grammar school. *I have written thousands of articles and reviews for countless publications.*
>
> * * * * *

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5 The Court of Appeal left remaining fact issues bearing on public figure status for the jury, under proper instructions from the Court. That determination was neither novel nor unconstitutional. See Annot., "Relative Provinces of Court and Jury as to Privileged Occasion and Privileged Communication in the Law of Libel and Slander," 26 A.L.R. 830 (1923), and supplements thereto.

In addition to that I have written a number of books and pamphlets and plays.

I have been interviewed during the course of twenty or thirty years, I suppose by every radio and television station in the State of Illinois at one time or another on news programs, on forums, these conversation programs and many other programs. I suppose I have been on every one of those programs, unrehearsed programs.

In addition to that, I have been on radio or television programs in various parts of the country in connection with cases and on other matters in Dallas, Texas, in New York City, Boston, Massachusetts, in Los Angeles, in Middletown, Connecticut, in Cleveland, Ohio. *I have been literally on hundreds, if not thousands of programs.*

* * * * *

Now, in addition, let me say that I have made speeches. I have spoken before, I would say, every synagogue and temple and many churches in this area and many other parts of the country. I have spoken before a large number of colleges and high schools and even some grade schools. I have made a large number of political speeches in connection with my campaign for election as a delegate to the convention. I have appeared on forums of the Adult Education Council for Greater Chicago, the American Jewish Congress and other organizations.

* * * * *

There has never been a period in my mature life when I haven't made public appearances of some kind. Supplemental Appendix on Appeal in this Court in *Gertz v. Welch*, *supra*, at pp. 13-36, submitted by appellees as part of the record before the Superior Court (emphasis added).

Elmer Gertz was held *not* to be a public figure, as a clear matter of law. This Court rejected his vast record of public prominence as insufficient. It was a much greater record of

public references, appearances and writings—all voluntary—than the record adduced against appellees.

Similarly, the record rejected as insufficient for "public figure" status in *Time, Inc. v. Firestone*, *supra*, showed that Mary Firestone was "prominent among the '400' of Palm Beach society", that her activities "predictably attracted the attention of a sizable portion of the public", that her "appearances in the printed press were evidently frequent enough to warrant her subscribing to a press clipping service", that her marital difficulties had become a "cause celebre" which "attracted national news coverage", that 88 articles had appeared in three Palm Beach newspapers alone, and that "far from shunning the publicity, Mrs. Firestone had several press conferences". 424 U.S. at 485 (dissenting opinion). This Court held she was not a public figure because

> She did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it. *Id.* at 453.

The record rejected as insufficient to make Ilya Wolston a public figure, in *Wolston v. Reader's Digest Ass'n*, *supra*, included a showing that he had been one of the subjects of a "major investigation into the activities of Soviet Intelligence in the United States", a nephew of convicted spies Myra and Jack Soble, that his refusal to appear before a grand jury "immediately attracted the interest of the news media", that he attracted a "flurry of publicity", that at least 22 newspaper stories appeared about him in New York and Washington alone, and that an FBI report named him in a list of alleged Soviet intelligence agents. This Court squarely held

> [T]he undisputed facts do not justify the conclusion . . . that petitioner 'voluntarily thrust' or 'injected' himself into the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States . . . It would be more accurate to say that petitioner was dragged unwillingly into the controversy. The Government

> pursued him in its investigation. . . . A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. 443 U.S. at 166-67.

It is apparent from these cases that "thousands" of books, articles and appearances (even voluntary ones) do not make one a "public figure"—as this Court held in *Gertz*; that press reports so numerous as to warrant retaining a clipping service do not create a "public figure"—as this Court held in *Firestone*; and that suspected involvement in espionage, massive investigation, identification by the FBI as a Soviet spy, and a flurry of publicity about it, do not make a "public figure"—as this Court held in *Wolston*. Clearly, therefore, the appellants' effort to prove the appellees public figures by charging that they have been investigated and by offering a collection of clippings was properly rejected by the Court of Appeal.

The soundness of the decision below is confirmed by the deposition testimony.

Penthouse's managing editor was asked:

> Q Had you ever heard of Mr. Adelson?
>
> A. I don't believe I ever heard of Mr. Adelson.
>
> Q Had you ever heard of Mr. Molasky?
>
> A. I don't believe I ever heard of Mr. Molasky.
>
> (Goode depo., at III, 166).

Another *Penthouse* editor who contributed to the La Costa article was asked:

> Q Had you heard anything of La Costa at that time?
>
> A. No. It was a new subject to me.
>
> * * * * *
>
> Q Had you heard of Merv Adelson?
>
> A. I don't believe I had.

Q Did you hear of Irwin Molasky?

A. Molasky?

Q Yes, Molasky?

A. No.

(Ballad depo., at 11-12)

Similar testimony was given by other editors and by defendant Guccione.

The Superior Court's summary determination that appellees were all "public figures" as a matter of law was plain error. The California Court of Appeal properly vacated that erroneous partial summary judgment.

B. The Court Of Appeal Correctly Held That The *Penthouse* Article Was Not A Privileged Communication Under Section 47(3) Of The California Civil Code. Its Application Of Long-Settled California Law Raises No Federal Question.

The California Supreme Court held at an early date that news reports were not privileged communications at common law, even though their subject matter is of legitimate interest to the public. *Wilson* v. *Fitch*, 41 Cal. 363 (1871).

Section 47(3) of California's Civil Code was later enacted extending a qualified privilege to a communication made "without malice"

> to a person interested therein (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.

Thereafter, the California Supreme Court expressly considered whether, as a matter of statutory construction, Section

47(3) applied to newspaper articles. The defendant in that case, a local Sacramento newspaper, had published a false report (as here) that the plaintiff had committed a crime. It argued that the news article was a privileged communication under Section 47(3) and under the California Constitution because of the public's interest in the news. The California Supreme Court rejected both arguments. *Gilman* v. *McClatchy, supra*. It is stated in a standard California commentary, 4 B. Witkin, Summary of California Law §§ 306-09 (8th ed. 1974), referring to Section 47(3) of the Civil Code, that:

(1) The "interest" applies to a defendant who "is protecting his own pecuniary or proprietary interest".

(2) The required "relation" between the parties to the communication is a contractual, business or similar relationship, such as "between partners, corporate officers and members of incorporated associations," or between "union members [and] union officers".

(3) The "request" referred to must have been in the course of a business or professional relationship.

In *Gilman* v. *McClatchy, supra*, the Court recognized that Section 47(3) had been extended to include fair comment on the conduct of "public officials" but it refused (much as this Court did later in *Gertz* v. *Welch*) to extend the qualified privilege to all matters of "public interest" on the ground that such an extension "would . . . put upon the people a greater evil than that which the constitution sought to prevent."

This principle was repeatedly reaffirmed in subsequent cases. In *Morris* v. *National Federation of the Blind*, 192 Cal. App. 2d 162, 13 Cal. Rptr. 336 (1st Dist. 1961), it was applied to a magazine which (as here) published the accusation that plaintiff was a "racketeer". The Court rejected the contention that the article was a privileged communication under the California Civil Code, Section 47(3), stating:

> Far from showing a communication to parties whose interest warrants the disclosure, this complaint in fact alleges that the magazine in which this article was published is a national . . . magazine of general circulation. Thus it negates a communication designed only for a group of interested persons.

So, too, in *Newby* v. *Times-Mirror Co.*, 46 Cal. App. 110, 188 P. 1008 (3d Dist. 1920), where an attorney sued a newspaper for libel, and the newspaper alleged a privilege under Section 47(3) of the Civil Code, the court held that an article is not privileged "simply because it relates to a subject of public interest".

To the same effect, *see, e.g., Earl* v. *Times-Mirror Co.*, 185 Cal. 165, 196 P. 57 (1921); *Newby* v. *Times-Mirror Co.*, 173 Cal. 387, 160 P. 233 (1916); *Edwards* v. *San Jose Printing & Publishing Society*, 99 Cal. 431, 34 P. 128 (1893). All of these cases involved local California newspapers.

Judge Dell's ruling below ignored those controlling precedents as well as two prior rulings by the Los Angeles County Superior Court in this same case. His decision that the La Costa article was privileged because it "concern[ed] matters of public interest" was plainly incorrect as a matter of California law. The Court of Appeal correctly vacated his decision and the California Supreme Court denied review. The ruling was one of California law. It raised no issue reviewable by this Court.

CONCLUSION

The appeal should be dismissed or, in the alternative, the decision below should be affirmed.

Dated: January 2, 1981

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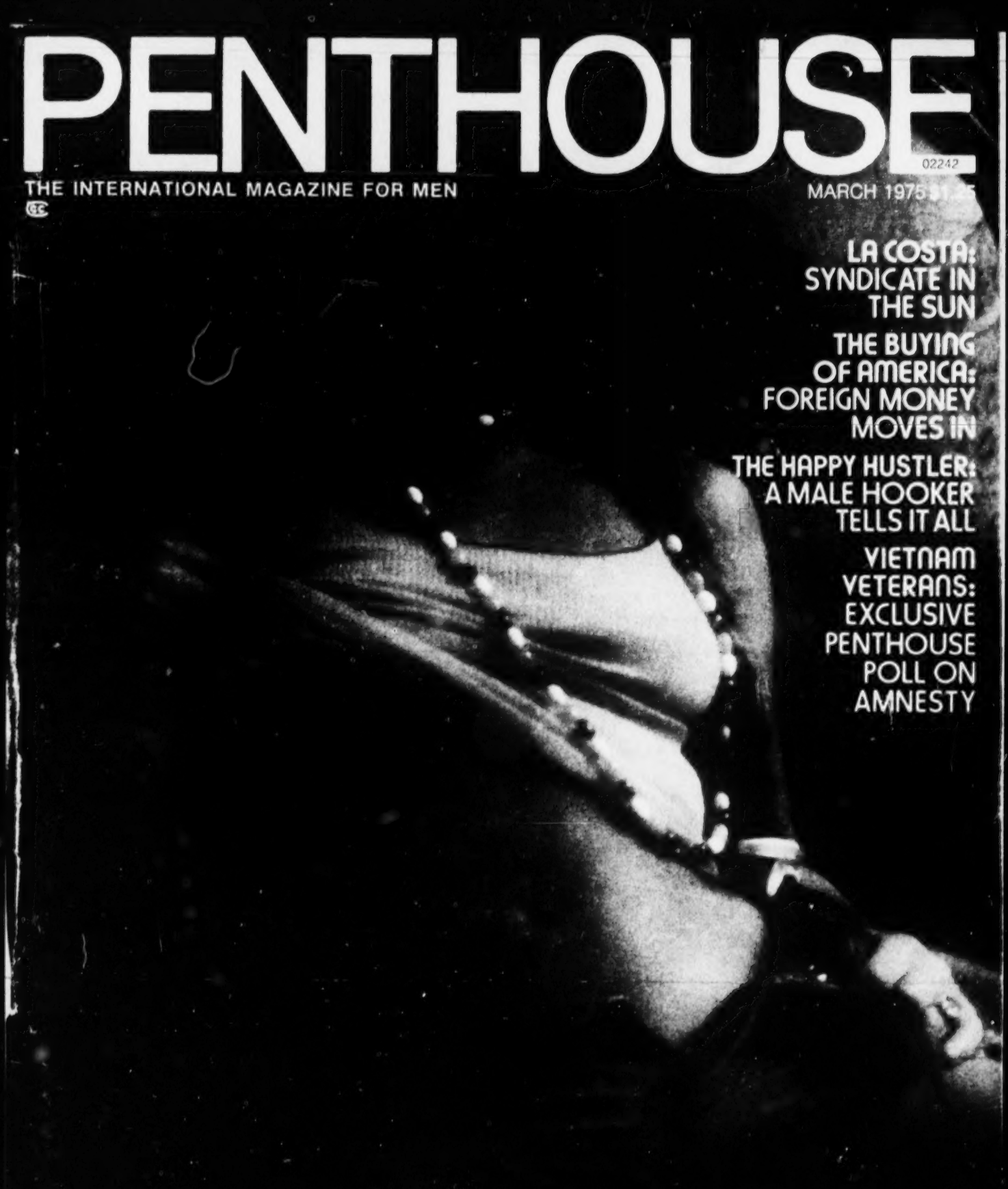
APPENDIX

PENTHOUSE

02242

THE INTERNATIONAL MAGAZINE FOR MEN

MARCH 1975 $1.25



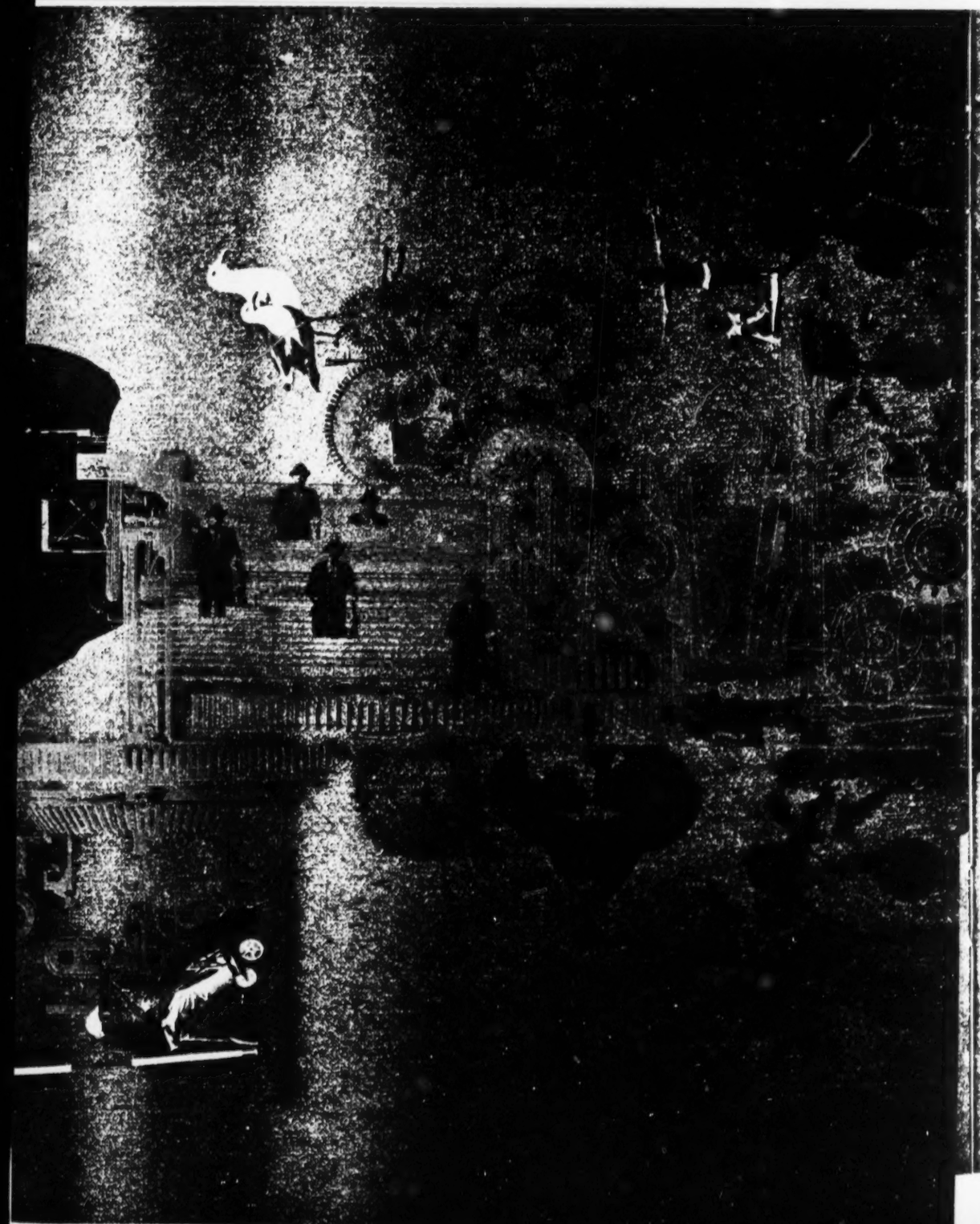
LA COSTA: SYNDICATE IN THE SUN

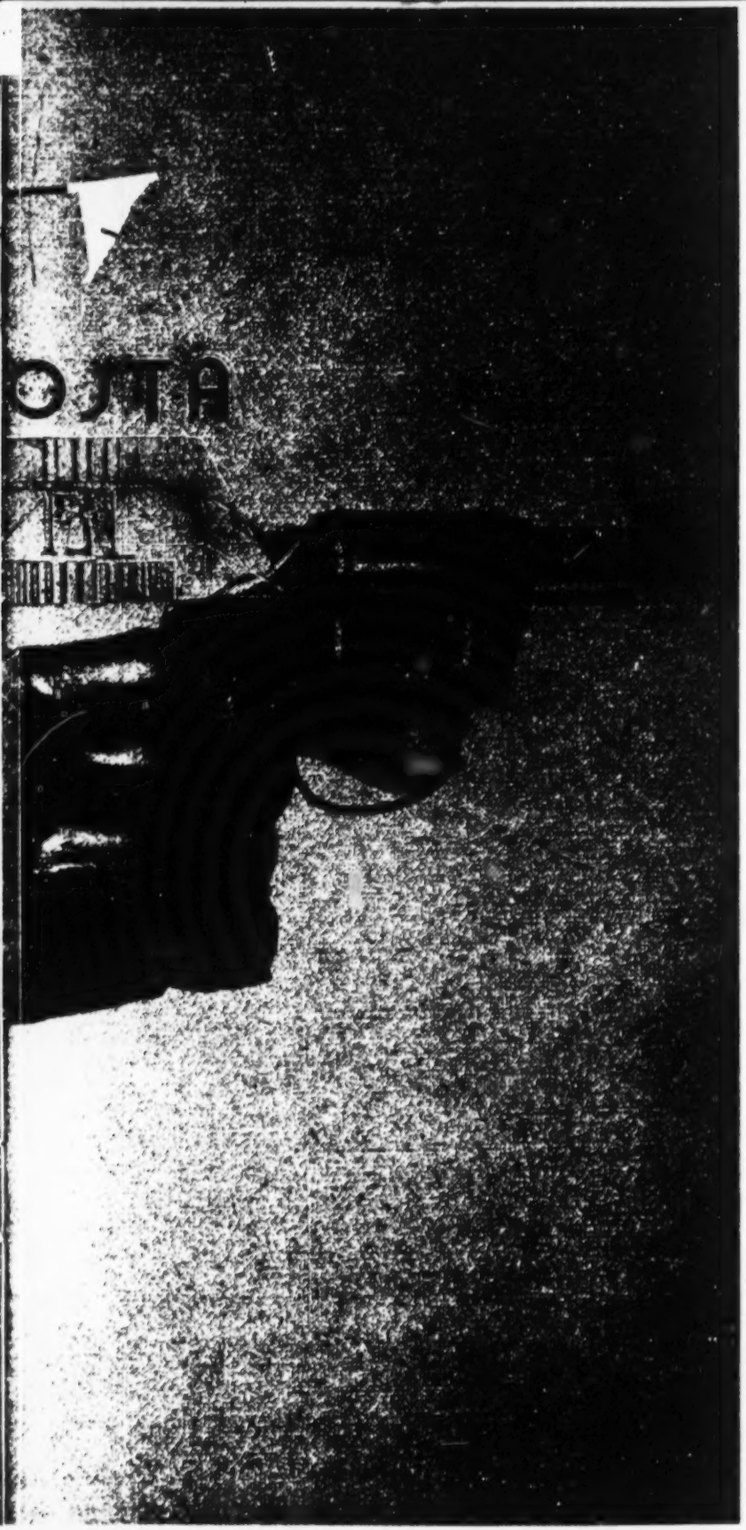
THE BUYING OF AMERICA: FOREIGN MONEY MOVES IN

THE HAPPY HUSTLER: A MALE HOOKER TELLS IT ALL

VIETNAM VETERANS: EXCLUSIVE PENTHOUSE POLL ON AMNESTY

Belgie 120 frs. Danmark 15 kr.inkl.moms. **Deutschland 8.40 DM/France 12 NF/Israel 7.90** Israeli Pounds. Italy 1650 Lire. Japan 750 Yen. Suomi 7.50 F.kr. Nederland 6.90 FL. New Zealand $1.50/**Norge 13 N.kr/Oesterreich 55 Sch. Philippines 18 Pesos** Schweiz 7.90 frs. Sverige 9.50 kr.inkl.moms. Australia $1.50





The Hundred-Million-Dollar
Resort with Criminal Clientele

LA COSTA

By Lowell Bergman and Jeff Gerth

"I received a call from Ehrlichman in San Clemente telling me . . . to come to California that night so that he could discuss in full detail the problems of how to deal with the forthcoming Senate hearings. Everyone was staying at the La Costa Resort Hotel." —Testimony of John W. Dean III before the Senate Select Committee on Presidential Campaign Activities, June 25, 1973.

"Hell, what's to keep La Costa from becoming the site of [another] Apalachin convention? . . . They could hold a two- or three-day meeting, and we'd never even know the damned thing was going on." —A San Diego law-enforcement officer, quoted in the Los Angeles *Times*.

Rancho La Costa is a 5,600-acre California coastal complex located thirty miles south of Nixon's San Clemente estate. It is a luxurious arrangement of residential units, a resort hotel, a theater, a golf course, the only AMA-approved health spa in the country, various convention facilities, and a country club. It cost close to $100 million to build, and more than a thousand employees look after its maintenance.

It looks very innocent. But in reality this rich man's playground, patronized by powerful figures from business, labor, and government, was established and is frequented by mobsters.

The greedy manipulations of the men who hold their meetings at La Costa have contributed to a massive bank failure and to a plague of security frauds that have been estimated to cost Americans fifty billion dollars. These manipulations have helped tighten the market for the average citizen trying to borrow money as well as encouraging the inflationary spiral. In addition, the illicit financial operations planned at La Costa have cost taxpayers uncounted millions of dollars, not only in uncollected income taxes but also in other, more complicated ways.

The interwoven jungle of deals, arrangements, and associations—directed by keen legal and financial architects operating with a seemingly unlimited re-

serve of cash—has resisted the probings of most investigative reporters and has blunted, or corrupted, most of the official investigations.

The primary founders of La Costa were syndicate "bluebloods." Their roots were in Prohibition rum-running and bust-out gambling. The bulk of the financing for La Costa since its inception ten years ago has come from friends in the scandal-ridden Teamsters Central States Pension Fund. Additional funds were made available by C. Arnholt Smith's United States National Bank of San Diego. A member of Nixon's inner circle along with Bebe Rebozo and Robert Abplanalp, Smith ran into trouble early in the Watergate struggle. In October 1973, the Federal Deposit Insurance Corporation declared his billion-dollar bank insolvent, ending one of the largest financial frauds in history.

Rancho La Costa has been controlled by the Moe Dalitz mob—which includes Dalitz, Allard Roen, Merv Adelson, and Irwin Molasky. (They use the acronym DRAM, made up from the first letters of their last names, as a kind of corporate shorthand.) Dalitz has been a prime mover in transforming organized crime into a financial powerhouse. At seventy-five, he is a senior mentor among the criminal aristocracy. A close friend commented, "You'd never guess who he is if you saw him. He's a little man with a round head who walks around with his arms wrapped behind his back like Groucho Marx."

He and his partners at La Costa represent a major force in entertainment, television (Lorimar Productions, founded by Adelson and Molasky, among others, produces such shows as "The Blue Knight," "The Waltons," etc.), construction, laundries, and, of course, gambling. It was Dalitz who persuaded the then-president of the Teamsters Union, James Riddle Hoffa, to finance Las Vegas casinos, starting with Moe's Desert Inn and related properties, with Teamsters retirement cash.

The La Costa operation is an extension of services the crime syndicate people provide in their Las Vegas casinos. Events at La Costa are regularly featured in society columns and travel sections. This adult playground has attracted glamorous jet-setters as well as a horde of underworld heavyweights. La Costa regulars include John "Jake the Barber" Factor, who has been identified in news reports as a notorious international confidence man and stock swindler; Allen Dorfman, a special consultant to the Teamsters Pension Fund who was convicted of kickbacks and is currently under indictment; Jim Braden (Eugene Hale Brading), mob courier and "lovebird swindler," as he was known in Dallas; Arnold Kimmes, a San Diego "developer" who has served time for fraud; Anthony Giacolone, a mob boss in Detroit; Louis "the Tailor" Rosanova, a Chicago mobster now headquartered in Georgia; and Anthony Spilotro, a notorious thug from Las Vegas.

A veneer of respectability is maintained by a host of resident celebrities, including Sandy Koufax, Hoagy Carmichael, and Desi Arnaz. Country-club members and regular guests such as Frank Sinatra, Bing Crosby, and Dean Martin rub elbows with Henry Ford and others of the established rich.

Moe Dalitz likes gold and tennis—tastes acquired since the old days. Accordingly, La Costa is studded with more than twenty tennis courts. When Dalitz left his Las Vegas home adjoining the Desert Inn course, it was to relocate in an almost identical house next to the La Costa course—the world's largest and costliest ($2.4 million to date).

The PGA Tournament of Champions, formerly a Desert Inn feature, was moved to California by Dalitz. It typifies the La Costa style. Each player gets $2,000 plus expenses just for showing up. Until 1971, the 170 crowd-control marshals were active-duty U.S. Marines bussed in daily from Pendleton. They were fed all week and given golf hats and windbreakers for their troubles.

The nerve center of La Costa is the country club, which houses the land-sale office, golf shop, restaurants, swimming pool, and meeting rooms. The latter have been the site of numerous executive-board Teamsters meetings. When business and security are primary, the management makes use of six "executive houses" nearby. Here the most important VIP's can relax, safe from the curious as well as from the surveillance of law-enforcement agencies.

The nature of the clientele makes understandable La Costa's preoccupation with security. A great many important politicians have stayed there. High-ranking White House staff members used La Costa's secure grounds for planning parts of the infamous Watergate coverup. Up until the time this was revealed by John Dean, public figures of both parties could be found taking the waters there. They included Cook County judges and Nevada lawmakers as well as senators and congressmen who took off weight at the spa and hobnobbed with show-business celebrities in the bar.

Republican Senator Jacob Javits of New York was a frequent visitor. Sources close to La Costa claim that Javits was considered a "special guest" who received services on the cuff. Contacted in Washington, the senator acknowledged through an aide that he had stayed at the resort, but insisted he had paid his own bills.

An aide to Arizona's Republican Senator Barry Goldwater told *Penthouse* that the senator has been a "close friend" of C. Arnholt Smith's for some time and that Goldwater has "nothing but sympathy for Smith." As for visits to La Costa on the part of the senator, the aide remarked, "it would surprise me if he hasn't."

And why not? The senator's brother, Robert, was a charter member of La Costa and is a frequent participant in Teamsters outings there—fun things such as the Frank Fitzsimmons Golf Tournament, named in honor of the Teamsters president. Also, the Goldwater family owns a large part of the Valley National Bank of Phoenix. *Penthouse* has documented the use of the Valley National Bank by C. Arnholt Smith to obtain personal funds at a time when federal investigations were tightening a noose around Smith's empire. In July 1973, the SEC alleged that Smith, in violation of the law, was selling debentures issued from his U.S. National Bank after the SEC had filed its suit in May 1973. Some of these debentures were pledged to the Valley National Bank to support loans it had made to Smith.

BIG CRIME IS BIG BUSINESS

The triumvirate of government, business, and organized crime has been a fact of life for years. More recently, labor leaders have joined the club. In their parallel drives for profit and power, the gangsters became businesslike while many entrepreneurs and union leaders adopted gangster methods. Back-room poker players and candy-store bookies have become tycoons controlling billion-dollar cash flows. Former hit men are now experts at security frauds and aspiring Horatio Algers cultivate the fine art of the fix.

The business of the mob has spread everywhere. Lucky Luciano fondly recalled in 1961 how his outfit had "muscled into the milk business. *And we're still there.*" Jonathan Kwitny described in the *Wall Street Journal* how a mob-related "brokerage" business in New York levied a fifty-cent tariff on every 100 pounds of beef brought into the metropolitan area. Kwitny's story went on to detail how payoffs were made to union officials on behalf of the nation's largest beef packer.

The continuity of the La Costa gang's history brings the nature of organized crime into focus. In 1949, when Elliot Ness (of "Untouchables" fame) was Cleveland's Public Safety Director, he drove Dalitz and his friends from the shores of Lake Erie. The Cleveland Syndicate, while maintaining influence in the East through protégés, spent the next twenty years presiding over a hotel and gambling empire in Las Vegas.

The comfortable cover of Las Vegas was destroyed by Attorney General Robert Kennedy. By 1964, DRAM's casinos were infested with wiretaps and special surveillance teams looking for "skim" (unreported income from gambling). Then Allard Roen, Dalitz's favorite uncrowned prince, was forced to plead guilty to a felony rap in what turned out to be one of the largest stock frauds on record. Dalitz himself was enmeshed in a tax-fraud case; he escaped by having his accountant take the rap.

The new heat, along with burgeoning opportunities in real estate, convinced DRAM to shift their base to California.

By the early Sixties, organized crime had a working relationship with San Diego's power elite. C. Arnholt Smith and his ex-shoeshine boy and protégé, John Alessio, exercised total control over San Diego and its neighboring Mexican city of Tijuana. Smith had reigned for a quarter of a century as chief money lord and political boss of San Diego city and county. Through Alessio's Agua Caliente racetrack and international

CONTINUED ON PAGE 110

LA COSTA

CONTINUED FROM PAGE 48

bookmaking operation, the mob could "lay off" huge amounts of money.

Through Alessio, Smith's bank—the U.S. National Bank of San Diego—swelled with the receipts of Tijuana's Caliente track and international bookmaking. North of the border, Alessio became an important figure in the Democratic Party, while Smith rubbed elbows with the Republicans. Smith became, in the words of President Nixon's wife, Pat, "one of our earliest supporters." Until Watergate, he was also one of the biggest supporters.

Most observers of the La Costa phenomenon and organized crime agree that the DRAM group selected San Diego—and particularly its undeveloped northern area—because there was no established syndicate sphere of influence, and the local press was supportive of Smith rule.

The La Costa-Teamsters-Smith relationship was rarely advertised. San Diegans were unaware that their "Man of the Century" was part of an unholy alliance. But as early as 1967 a massive report prepared confidentially for the California Department of Corporations and the State Attorney General's Office began to tie together various groups active in northern San Diego large-scale real-estate transactions and financial manipulations. The report made note of the "efficient organization and communication between various factions making up the total of organized crime."

In addition to the La Costa group, the report also focused on the Baptist Foundation of America. This church organization had close ties to the La Costa-Teamster clique. It was a combine of ministers, fast-buck artists, and gangsters who purchased land around northern San Diego County with phony collateral, creating what was to become a $26-million stock fraud.

The greening of La Costa's arid grazing land was costly; but unlike most investors and developers, the La Costa crew had extraordinary resources. Trustees of the Teamsters Central States Pension Fund sit on La Costa's board, and over $50 million in Teamster funds have gone into the work.

Half a million Teamsters members are covered by the Central, Southeast, and Southwest Areas Pension Fund. Unlike the Teamsters' Western Conference fund—which has its assets managed by the Prudential Life Insurance Company as a part of its general investment portfolio—the Central States Fund is handled directly by union officials and handpicked employer representatives. Over $5 million pours into the Chicago head office weekly. With over $1.5 billion in assets, it is the largest private cache of its kind.

The late Irvin J. Kahn, an attorney turned developer, was the largest recipient of Teamsters loans. Over $185 million went to his purchase of some sixty square miles of San Diego real estate just south of La Costa. Kahn's unlimited line of credit with the Pension Fund was due to the good offices of St. Louis attorney Morris Shenker, who was Jimmy Hoffa's chief attorney. Shenker inherited most of Kahn's properties after his sudden death in September 1973.

Shenker, who has recently been under investigation by a federal strike force and grand jury in St. Louis, has emerged as a top financial arranger. His Byzantine financial maneuvering astounds investigators in and out of government. He first came to national attention twenty-five years ago during the Kefauver hearings. Twenty years later, his mob ties were detailed in a *Life* magazine exposé of former St. Louis Mayor A. J. Cervantes. (Shenker had got himself appointed to the St. Louis crime commission!) Since then, Shenker has shifted headquarters to his Dunes hotel and casino in Las Vegas. He visits San Diego often to oversee his country clubs, hotels, and land developments. He is a regular at high-level La Costa gatherings.

The Central Conference Fund has been involved in fraud and kickback scandals resulting in numerous indictments. All this hasn't bothered them one bit. As a private bank for its favorites, it has provided almost a billion dollars in preferred loans for luxury developments, vast real-estate tracts, slot-machine companies, and gambling casinos. Extensive investigation has uncovered scant evidence of any investments in cooperatives or low- or middle-income housing where rank-and-file Teamsters might reasonably expect to find shelter.

One of the many security-conscious conclaves at La Costa was a gathering on July 17, 1972, of Teamsters officials, organized-crime figures, and major Pension Fund recipients, among others. One of the participants was the son of Jimmy Hoffa, the former head of the union, who had been convicted of jury tampering and fraud involving the Teamsters Union Pension Fund.

It was at these meetings that the officials formally endorsed Nixon's reelection. Subsequent investigations have revealed that Allen Dorfman—the Pension Fund's "special consultant"—had already collected $1 million from Teamsters officials and organized-crime figures to donate to the Committee for the Reelection of the President in exchange for Hoffa's release and a "favorable" review of federal investigations into Teamsters officials and friends.

Dorfman lives in a luxury home next to La Costa's lush golf course; in between indictments for kickbacks and fraud involving Fund money, plus a nine-month stint in prison, Dorfman played a prominent role at Teamsters conclaves.

He inherited his interest in the pension fund from his late father, Paul "Red" Dorfman, who was one of the founders. Before his latest indictment for defrauding the fund (February 1974), Dorfman's control was complete. In the words of one insider, "He believes he's immune to everything. His power and authority were about as total as you can get."

Legal guidance for La Costa comes from John Andrew Donnelley, a leading San Diego attorney and power broker. In the late Forties, Donnelley had gone to Las Vegas with a client, Wilbur Clark, to help arrange construction of the Desert Inn.

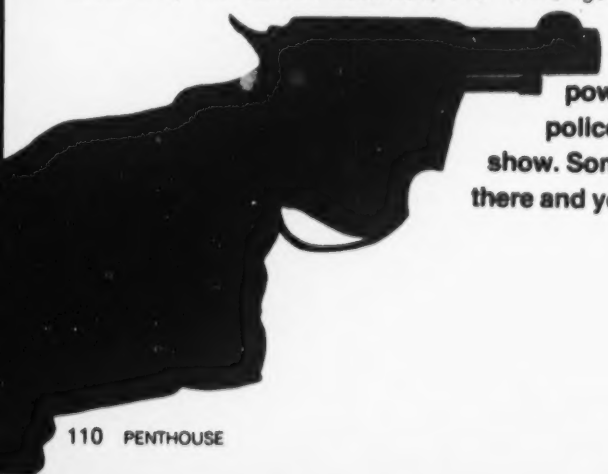
In San Diego, Donnelley became an increasingly important functionary in the Smith machine. In Las Vegas he became chief counsel to the DRAM group. He is credited by some with saving Dalitz and his whole Las Vegas operation from ruin during the Guterma stock-fraud debacle. When Allard Roen, then the Desert Inn's executive director, was forced to plead guilty to fraud in that case, Donnelley took his place.

As a top-notch attorney, his services were invaluable during the intricate legal and financial maneuvering. Federal Tax Court proceedings in 1964 revealed that during the 1950's Donnelley was a key arranger of a series of transactions which the court concluded were "a sort of 'Tinker to Evers to Chance' "—in other words, something on the order of a preconcerted and well-coordinated triple play.

Donnelley covered all bases, representing or owning the Martinolich Shipbuilding Company, Refrigerated Transport Co., and National Steel and Shipbuilding and pushing a variety of purchases, loans, slot-machine deals, and construction projects.

The other owners involved included Wilbur Clark, Moe Dalitz, and Arnholt Smith. While the matrix of deals and loans involving hundreds of thousands of dollars never resulted in criminal charges, they spurred further federal probes into Dalitz's income tax returns.

More importantly, these early deals provide the first evidence of Donnelley's future



" 'These people are really powerful,' said one California policeman. 'They run their own show. Someone could get killed out there and you would never know it.' "

role in arranging the move to San Diego and as key power broker in the group's internal affairs.

When DRAM began buying up northern San Diego County real estate in 1962, Donnelley helped them set up a string of corporate fronts—Planet, Inc., Star Investment, and the Bagshaw Corporation—with which to take legal title to the initial 2,000 acres.

Donnelley helped coordinate the flow of Teamsters cash into San Diego real estate. His law office has handled over $250 million in Teamsters land investments, and he has admitted in an interview that the various parties he represented were on "friendly" terms.

In 1970, the first crack in the Smith empire appeared—the indictment of John Alessio for over $1 million in tax evasion. Alessio had been transporting large unreported sums of cash in steel drums to San Diego to pay for the renovation of his Hotel Del Coronado (the set for the film *Some Like It Hot*). His three-year jail term was eased by frequent vacations outside the federal prison at Lompoc, California.

Alessio's troubles pale before the onslaught that finally overtook Smith in 1973. While his political protector and longtime associate Richard Nixon was hamstrung by daily Watergate revelations, the SEC, the IRS, and the Federal Deposit Insurance Company closed in. In addition, the Justice Department's Organized Crime Section began to investigate Smith's ties to the mob.

All of these complicated interrelationships came together in the matter of La Costa's use of the U.S. National Bank for its business accounts and for the banking of its pension-fund loans.

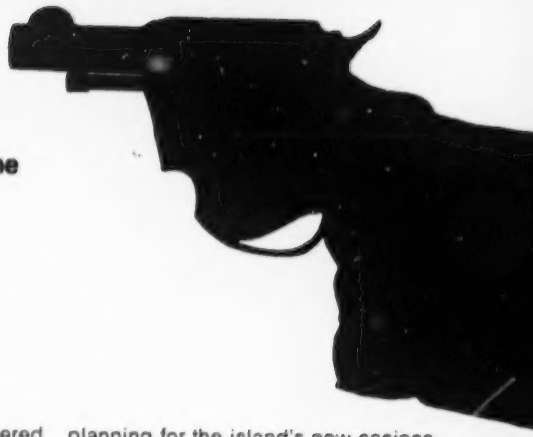
On October 15, 1973, Lew Lipton, an officer of the bank and an emissary from Smith, was in Miami, meeting with Teamsters boss Frank Fitzsimmons and trying to get additional Teamsters deposits for Smith's projects. He was shaken when Fitzsimmons waved a copy of the *Miami Herald* announcing one of the largest bank failures in U.S. history. It was the USNB.

The Federal Deposit Insurance Corporation, which took control of the collapsed bank and which sued Smith and other officers for $410 million in damages, has refused comment on questions relating to the amount of Teamsters money that was on deposit. (The bank's assets merged into the Crocker Bank, which guaranteed deposits on account.)

On July 2, 1974, after a ten-month investigation, a federal grand jury in San Diego returned a twenty-five-count indictment against Smith for secretly funnelling $170 million from his U.S. National Bank. The complex conspiracy alleged in the indictment—there were 165 overt acts—was part of a scheme dubbed the Monster Project by Smith and his closest aides.

To bring the monster down, it had taken all the diligence of the press, the atmosphere of Watergate, and the hard work of those whom Smith called "government bureaucrats out to get me."

"Many people suspect that the government's inadequate investigation of La Costa is a reflection of the group's political power."



But Smith's arrogance was not shattered. Even after the SEC action (May 31, 1973) forced him to report all large-scale transactions, documents indicate that he continued his wheeling and dealing. And, according to sources with firsthand knowledge, one of his close associates began making overtures to an important government witness against Smith right after his indictment.

THE LANSKY CONNECTION

One important name has been omitted from the La Costa story. Meyer Lansky, the dark eminence of organized crime and the financial brain of Lucky Luciano's original organization, has a long-standing relationship to La Costa. Some even trace La Costa's origins to a trip he made to Alessio's Tijuana racetrack fifteen years ago. Traveling by limousine down the old highway—El Camino Real—Lansky happened on the area. Already familiar with the high-profit marinas and waterways of Miami, he saw its possibilities. The legal and illegal profits of the mob's worldwide operations needed more outlets. Soon after, Lansky's allies were sizing up real estate and laying plans for future development. Five years later, La Costa Country Club opened its doors.

Whether he gave an order or a recommendation is unknown. When *Penthouse* attempted to reach him through his attorney, E. David Rosen, he was unimpressed with this desire to reconstruct history. "I advise you not to try and contact my client," said Rosen.

For forty-five years, Lansky has had a harmonious relationship with La Costa's Moe Dalitz. While Dalitz and his group paid close attention to Las Vegas and the West Coast, Lansky was busy in Florida, Cuba, and the Bahamas. Each in turn cut the other in on "skim," laundering techniques, and new investment opportunities. While Lansky ruled the Havana gambling scene during the reign of dictator Fulgencio Batista, his Cleveland friends were cut in on his Hotel Nacional de Cuba.

After Castro closed the gambling factories of Havana, Lansky's group moved to the Bahamas. By 1967, a Royal Commission of Inquiry was digging deep into the financial operations of the Grand Bahama Development Corporation. The deft hand of Lansky appeared in behind-the-scenes planning for the island's new casinos.

Lansky, who generally stayed behind the scenes, worked through Wallace Groves, an experienced financial operator. When the heat increased in the Bahamas, Groves took advantage of La Costa's hospitality, commemorated in a 1968 directive from La Costa official Ben Vitale to the resort's employees:

> Mr. and Mrs. Wallace Groves will be arriving here as a guest of La Costa and Mr. Herman Perl. . . . The principal partners at La Costa are delighted that Mr. Groves is visiting with us. We wish to extend every courtesy and compliment to Mr. Groves and his family to make their stay here a pleasurable and memorable one.

Perl, Vitale, and Groves have all been principals in the Grand Bahama Development Company, now known as Devco. Perl, a mastermind of Bahamas resort sales, had been brought to La Costa to increase profits for the DRAM group.

Lining up the ever-helpful Arnholt Smith's USNB as a prime lender, they moved into condominium development. La Costa became a new city built around the owner's plush real-estate area.

Within the last few years, Groves and Vitale have shifted their California base to Stallion Springs, a resort in the Tehachapi Mountains north of Bakersfield. Similar to La Costa in design, Stallion Springs is owned by Devco, which is now controlled by Groves and his wife.

On January 19, 1970, Lansky reportedly flew in to La Costa accompanied by some superstar swingers of the sports world. Between rounds of golf, Lansky attended meetings with Teamsters Pension Fund controllers and his old friend Moe Dalitz.

Weeks later, he went south to a new and even more exclusive mob retreat in Acapulco, Mexico. After huddling in Acapulco with a variety of old cronies and representatives of the Canadian mob, Lansky managed to elude intelligence agents of three countries. Six months later, the Illinois Bureau of Investigation, examining a small Acapulco hotel called The Towers, discovered that Meyer had used it as a hideaway to lose his pursuers. The Towers, a plush preserve, was owned at that time by La Costa members.

The leadership of La Costa has demon-

strated an uncanny ability to grow and survive. Their financial reserves tower over those of rival business groups. Their legal and financial advisers consistently stay one step ahead of law-enforcement investigators, and inquiring citizens are left in the dark as to the real story.

It wasn't until November 30, 1974, in an ABC network news report on Jimmy Hoffa, that La Costa received any unfavorable publicity before a large audience. Ironically, a Los Angeles affiliate of ABC—a network which has aired numerous sports specials from La Costa—mysteriously canceled an earlier investigative report on the resort and its owners.

When anything threatens La Costa, the heavy artillery—money—is rolled out. The technique is Meyer Lansky's legacy to his associates; he has had a lifetime of experience in the laying out of whatever it takes to remain undisturbed.

An example of how La Costa avoids unnecessary trouble is contained in a federal intelligence report on a meeting held there in July 1972. Teamsters executives and various cronies, advisers, and borrowers descended on La Costa to discuss, among other things, protection. A decision was made to annex La Costa to the tiny coastal town of Carlsbad-by-the-Sea. A new San Diego district attorney hostile to Smith rule had been elected after a series of massive bribery scandals in local government. According to the federal law-enforcement report, "It is believed that the real reason for having this annexation take place is that surveillance by the San Diego Sheriff's office will [now] be restricted." In November 1972, the citizens of Carlsbad voted 41 to 39 to annex La Costa, thereby removing the resort from county jurisdiction.

The financial and political clout of the La Costa group generates a certain powerless feeling and even a fear within the local community. Nearby residents and businessmen speak of "their endless supply of money." A local police officer commented to *Penthouse*, "I used to be assigned to La Costa. I sure was glad when I was transferred. These people are really powerful. They run their own show. Someone could get killed out there and you would never know."

Law enforcement on the state level hasn't been very effective, either. Consider what happened in the late 1960's when the California attorney general's office showed signs of following up criminal activity.

In 1967, the California Department of Corporations report was being prepared. State agents were active in closing down the Baptist Foundation of America security fraud. Well-known mob figures began to have trouble. Jimmy "the Weasel" Fratianno, an infamous hit man, found his movements closely watched. Alessio and his brothers were under constant surveillance. Smith's name began to crop up in more and more intelligence reports. One named his bank as a major supplier of loan money to mob-operated bars and restaurants.

With the election of 1970, all this came to an end. Evelle J. Younger became the new attorney general. After a tumultuous term as district attorney of Los Angeles, Younger had gained a reputation as a "law and order" man. A consummate opportunist in the Nixon tradition, he soon made it perfectly clear who he thought were the enemies of the people.

Under Younger's leadership, the "yellow peril" took the heat off organized crime in California. His office issued reports and he himself made a straight-faced proclamation that so-called "Chinese youth gangs" represented the newest and greatest threat. The supporting cast in Younger's scenario included Hell's Angels and a wide variety of "militants."

In an interview with *Penthouse* and Katy Butler, a reporter for the San Francisco *Bay Guardian*, Younger could not remember the Baptist Foundation case (a $26-million fraud) or any State investigations of John Alessio and C. Arnholt Smith. This memory lapse becomes understandable after examining the sources of contributions made in support of Younger's campaign during the 1970 election.

First, there was over $45,000 from Conrad Arnholt Smith. Most of it was officially designated as loans from Smith, his daughter, and Smith's political adviser, Frank Thornton. The loans were never repaid, a fact which should have been of some concern to an attorney general. Smith was Younger's largest contributor, because unrepaid loans of this type are actually contributions and have to be reported as such. Said the attorney general: "Mr. Smith and Mr. Thornton apparently borrowed from themselves and spent it with Barnes-Champ [Smith's advertising agency], and I know very little more than that about it."

The repeated failures of state and local law-enforcement agencies suggest that the only apparatus capable of taking on such a complex, sophisticated, multijurisdictional phenomenon is the federal government. But knowledgeable law-enforcement officials are frustrated over the fact that investigations have been miserably inadequate, despite the existence of eighteen strike forces around the country, staffed with specialists from various government agencies (IRS, FBI, SEC, Post Office, etc.) and directed by capable Justice Department attorneys.

Many suspect that the government's lack of commitment is a reflection of the La Costa group's political power. A high official within a Justice Department organized-crime strike force remarked to *Penthouse*, "They're too smart for us. We'll never put them away."

Because of the complicated financial matters involved, the agency best equipped to deal with the problem is the Intelligence Division of the IRS. As for the Federal Bureau of Investigation—which has four times as many special agents as IRS Intelligence, as well as more criminal jurisdiction and investigative latitude—it has failed historically to combat organized crime.

Rumors that La Costa was to be sold to Japanese interests for $200 million have circulated regularly in the last few years. *Penthouse* has been able to document the fact that discussions have taken place between representatives of La Costa and certain Japanese investors, but except for the purchase of a small parcel of land in the industrial park, nothing firm has emerged from those discussions.

La Costa sales representatives are quick to deny these rumors. Said one official, "This whole package is too complex to sell, and besides we're the only ones who know how to run the place. Even if we sold out to the Japanese, we'd have to stay around for a couple of years to manage the operation."

Whether La Costa is sold or not is a mere detail. It is only a place. If the mob and its friends in business and government fly from La Costa, they will find some new nest.

CRIME AND CORRUPTION

La Costa's image as a posh resort camouflages its strategic importance to big crime. Camouflage is essential to crime, as labor organizations are transformed into company unions and private fiefdoms through racketeering; politicians swallow the intoxications of wealth, never questioning its sources; and a paper-hungry economy is unable to stop the flood of fraudulent transactions.

The record of C. Arnholt Smith is a classic example. Smith's political "influence"—corrupting politicians and bureaucrats—allowed him to amass a fortune while avoiding regulation of any kind. His final Monster Project nearly destroyed the tuna industry on the West Coast, taxi fleets in thirteen cities, and the livelihoods of thousands of farm and office workers. In addition, two major banks which incurred losses as creditors of Smith's fallen bank—Franklin National and Germany's Bank Herstatt—suffered economic ruin themselves.

The wave of financial corruption and securities fraud is so widespread that major banks are afraid to examine the paper (securities, etc.) they hold as collateral. The reason, according to a Senate probe, was the fear that unknown billions in "assets" would prove to be stolen or counterfeit.

The irresistible nature of crime and corruption permeates society. Over a dozen top corporations and their executives have pleaded guilty to illegal campaign contributions related to Watergate. Nine of the nation's major oil companies were involved in jointly bribing public officials. The country's largest railroad, Penn Central, went bankrupt as a result of a series of fraudulent transactions and investments.

Alliances between crime and wealth are an American tradition. With so much crime at the top, it is hardly surprising that many people see corruption as our dominant characteristic. The La Costa playground is a power center for the organization and proliferation of that corruption.

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